2005 BNH 001 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

New Technology Partners, Inc.,
Debtor

Bk. No. 03-11961-JMD
Chapter 11

In re:

FLH, Inc.,
Debtor

Bk. No. 04-11070-JMD
Chapter 11

Lyons Hollis Associates, Inc.,
Movant
v.

New Technology Partners, Inc.,
Debtor

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MEMORANDUM OPINION

I. INTRODUCTION

Lyons Hollis Associates, Inc. ("Lyons Hollis") filed motions against New Technology Partners, Inc. ("NTP") and FLH, Inc. ("FLH"), the Debtors ("Debtors"), seeking a relief from the

automatic stay pursuant to 11 U.S.C. § 362(d)(1) and (d)(2)[1] in order to pursue, in the United States District Court for the District of Connecticut, an action to have an arbitration award regarding attorneys fees modified or vacated (Doc. Nos. 77 and 27, respectively) (the "Stay Relief Motions"). In response, the Debtors objected to the Stay Relief Motions (Doc. Nos. 80 and 23, respectively). After a hearing on May 26, 2004, the Court denied the Stay Relief Motions and ordered the parties to file any challenge to the arbitration award with this Court on or before June 7, 2004 (Doc. No. 84). Lyons Hollis filed its Applications to Partially Confirm and Partially Vacate Arbitration Award (Doc. Nos. 90 and 31, respectively) (the "Lyons Application") and the Debtors filed their Motions to Confirm the Arbitration Award or, Alternatively, to Vacate the Portion of the Award that is in Favor of Lyons Hollis (Doc. Nos. 88 and 30 respectively) (the "Debtors' Motions"). The issue in this dispute is whether this Court should vacate all, or a portion of, the arbitrator's decision, which liquidated the Lyons Hollis claims in these bankruptcy proceedings.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

On June 2, 2001, NTP and Lyons Hollis entered into a Consulting Service Agreement ("Agreement") to have Lyons Hollis assist in selling NTP and FLH. The Agreement was drafted

[1] Unless otherwise indicated, all references to "section" or "§" refer to Title 11 of the United States Code.

by Lyons Hollis. It contained "boiler plate" language, which included an arbitration clause. The arbitration clause specified that the "prevailing party shall be entitled to reimbursement for its costs and expenses, including reasonable attorney's fees, all as determined by the Arbitrator."

Following the termination of the Agreement, Lyons Hollis claimed a breach of the Agreement. NTP commenced its chapter 11 proceeding on June 2, 2003. On September 3, 2003, this Court entered an Order (Doc. No. 42 in NTP bankruptcy case) granting Lyons Hollis' Motion for Relief From the Automatic Stay (Doc. No. 34 in NTP bankruptcy case). The dispute was then submitted to arbitration. In the arbitration proceeding, Lyons Hollis asserted three independent claims for damages:[2] (1) a contract claim, (2) a claim for breach of the duty of good faith and fair dealing, and (3) a claim for unjust enrichment. Additionally, both parties claimed they were entitled to attorney's fees under the "prevailing party" language in the Agreement.

The arbitrator found in favor of Lyons Hollis on the contracts claim and awarded Lyons Hollis the full compensatory relief it requested plus interest. However, Lyons Hollis' unjust enrichment and bad faith claims were denied. Furthermore, the arbitrator concluded there was no prevailing party because "Lyons Hollis prevailed on one claim and NTP on the other two." Award of Arbitrator at 11-12. For this reason, the arbitrator concluded that "the requests for costs, expenses and attorney's fees [were] denied." Id.

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[2] Although the Lyons Application and its Memorandum in Support of the Application (Doc. No. 112 in NTP bankruptcy case) refer to the claims of unjust enrichment and breach of good faith and fair dealing as "alternative" claims, the arbitrator specifically found they were independent claims. Award of Arbitrator at 11 ("Lyons Hollis's second claim is for breach of the duty of good faith and fair dealing, which it contends is different and distinct from its breach of contract case.") (emphasis added). Lyons Hollis has not asked to have this part of the Award vacated. Therefore, the arbitrator's finding that the claims are independent is "the law of the case." Field v. Mans, 157 F.3d 35, 40-41 (1st Cir. 1998). Accordingly, Lyons Hollis is precluded from relitigating that issue in this court. United States v. Vigneau, 337 F.3d 62, 67 (1st Cir. 2003), citing id.

III. DISCUSSION

A. The Standard of Review

A Court's review of "an arbitrator's decision is 'extremely narrow and exceedingly deferential.'" Gutpa v. Cisco Sys., 274 F.3d 1, 3 (1st Cir. 2001) (quoting Keebler Co. v. Truck Drivers, Local 170, 247 F.3d 8, 10 (1st Cir. 2001)). "Indeed, 'judicial review of an arbitration award is among the narrowest known to law.'" Id. (quoting Coastal Oil v. Teamsters Local a/w, 134 F.3d 466, 469 (1st Cir. 1998)). A court reviewing an arbitrator's decision will set that decision aside "only in very unusual circumstances." Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 237 (1st Cir. 1995) (quoting First Options v. Kaplan, 514 U.S. 938, 943 (1995)).

The Federal Arbitration Act states that a Court may vacate an arbitrator's award only where the award was procured by corruption, fraud, misconduct, or misuse of power by the arbitrator. 9 U.S.C. § 10(a). Additionally, courts have recognized a second, narrower set of grounds for review, which allows an arbitrator's award to be vacated due to "manifest disregard of the law." See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986). The test to challenge an arbitration award for manifest disregard of the law is: "the challenger's ability to show that the award is '(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact.'" Advest, Inc. v. McCarty, 914 F.2d 6, 8-9 (1st Cir. 1990) (quoting Local 1445, United Food and Commercial Workers v. Stop & Shop Cos., 776 F.2d 19, 21 (1st Cir.1985)). The Advest Court summarized this test when it stated: "Put differently, 'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' a court's

conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision." Id. at 8 (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)).

B. Claims for Relief

Two classes of arbitral decisions are subject to review. The first category arises when an award is contrary to the plain language of the agreement at issue.[3] Cases in the second category are the result of an arbitrator recognizing the law "but ignoring it."[4] Gutpa 274 F.3d at 3. Lyons Hollis made a claim of the second type. Specifically, Lyons Hollis asserted that, because the arbitrator found in favor of it for the contract claim, it was the prevailing party, and the term "prevailing party" is so unambiguous that the arbitrator's decision not to award it attorney's fees was in manifest disregard of the law.

Courts have recognized that "[i]n certain circumstances, the governing law may have such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it under the rug." Advest 914 F.2d at 10. Lyons Hollis argued this theory, stating the meaning of prevailing party is of such pristine clarity and so irrefutably applicable to itself that the Court should assume the arbitrator knew it but, nevertheless, "swept it under the rug." In support of its claim that the definition of "prevailing

[3] The first category of cases typically arise in labor arbitration. See, e.g., Strathmore Paper Co. v. United Paperworkers Int'l Union, 900 F.2d 423, 427 (1st Cir.1990); Berklee College of Music v. Berklee Chapter of the Mass. Fed'n of Teachers, Local 4412, 858 F.2d 31, 32-33 (1st Cir.1988), cert. denied, 493 U.S. 810 (1989).

[4] See, e.g., Carte Blanche (Singapore) Pte. v. carte Blanche Int'l, 888 F.2d 260, 265 (2d Cir. 1989); Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 750 (8th Cir. 1986), cert. denied, 476 U.S. 1141 (1986).

party" has "pristine clarity," Lyons Hollis cited Black's Law Dictionary[5] and three contracts cases from Connecticut, which define it as the party that "prevails on the main or significant issue."[6]

Connecticut law must be used to determine the meaning of prevailing party because the Agreement states that it "shall be governed by . . . the laws of the state of Connecticut." Consulting Service Agreement ¶ 10. See Arbordale Hedge Inv., Inc. v. Clinton Group, Inc., 1999 U.S. Dict. LEXIS 16827, at *7 (S.D.N.Y. Nov. 4, 1999) (citing Mastribuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63 (1995)). As Lyons Hollis argued, under Connecticut law, "prevailing party" means the party that "prevails on the main or significant issue."

Connecticut law as to the meaning of prevailing party is "clearly applicable to this case" because prevailing party is not explained or qualified by the Agreement, and Connecticut law on the issue is "well defined and explicit." Halligan v. Piper Jeffrey, Inc., 148 F.3d 197, 202 (2d Cir. 1998). Nonetheless, in order to prevail, Lyons Hollis must make "a showing in the record, other than the result obtained, that the arbitrator knew the law and expressly disregarded it." Advest 914 F.2d at 10 (quoting O.R. Sec. v. Prof'l Planning Assoc., Inc., 857 F.2d 742, 747 (11th Cir. 1988)). In this context, the term "'disregard' implies that the arbitrator[] appreciated the existence of the governing legal rule but wilfully decided not to apply it." Id.

Accordingly, the arbitrator's award was in "manifest disregard of the law" if the arbitrator knew this body of Connecticut law was controlling yet refused to apply it or ignored it altogether.

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[5] According to Black's Law Dictionary, the prevailing party is "the party in whose favor a judgment [was] rendered, regardless of the amount of damages awarded." Black's Law Dictionary 1206 (7th ed. 1999).

[6] Doran v. Allstate Ins., 1995 WL 774389, at *2 (Conn. Super. Dec. 5, 1995). See also, Seifert v. Neath/Martin Personnel, 2003 WL 22079540, at *6 (Conn. Super. Aug. 12, 2003) (holding that a plaintiff who prevailed on a breach of an employment contract claim but lost on a statutory wage claim was the prevailing party within the meaning of the contractual attorney's fees provision); Lyon v. Ferrant, 1991 WL 204490, at *5 (Conn. Super. Aug. 12, 1991) (holding that a plaintiff who sued under a lease, in whose favor judgment was entered, was the prevailing party within the meaning of the contractual attorney's fees clause even though the plaintiff recovered only one-sixth of its claimed damages).

"However, if there is no evidence that the arbiter[] had actual knowledge of what law was required, [she] could not have manifestly disregarded it." Arbordale, 1999 U.S. Dist. LEXIS 16827, at *7. Indeed, the Arbordale Court held that an arbitrator's award could not be modified, even though the controlling state law was "well defined and explicit" because "there was simply no evidence that the arbitrator[] knew the meaning of 'prevailing party' under [the state] law." Id.

As was the case in Arbordale, Lyons Hollis also failed to present any evidence that the arbitrator clearly identified the applicable, governing law and then proceeded to ignore it. In fact, the cases cited by Lyons Hollis were not cited in the arbitrator's decision, and the record does not indicate that "one of the parties clearly stated the law and the arbitrator chose not to follow it." Stark v. Sandberg, 381 F.3d 793, 803 (8th Cir. 2004) (quoting W. Dawahare v. Spencer, 210 F.3d 666, 670 (6th Cir. 2000)). Indeed, it is not at all apparent the arbitrator chose to ignore the prevailing law. The arbitrator determined there was no "prevailing party." Specifically, she noted: "There were three claims in this arbitration, all of which were the subject of evidence at the hearing and of legal argument and briefing. Lyons Hollis prevailed on one claim and NTP on the other two. Accordingly, I find there is no prevailing party. . . ." Award of Arbitrator at 13-14. The arbitrator chose to define "prevailing party" in terms of the entire proceeding. Lyons Hollis argued that "prevailing party" should be determined claim by claim. However, nothing in the record reflects that Connecticut law requires such a determination on a claim-by-claim basis or that any such law was recognized by or cited to the arbitrator. Accordingly, the arbitrator's decision not to award attorney's fees to either party was not in "manifest disregard of the law" and, therefore, may not be modified.

Although this outcome may be contrary to what Lyons Hollis intended when it drafted the arbitration clause of the Agreement, "the rules of law limiting judicial review and the judicial

process in the arbitration context are well established and the parties . . . can be presumed to have been well versed in the consequences of their decision to resolve their disputes in this manner." Id. (quoting Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 (8th Cir.)), cert. denied, 476 U.S. 1141 (1986)). Lyons Hollis, as drafter of the Agreement, chose arbitration as the means to resolve any disputes that might arise under it. It sought and obtained an order from this Court allowing its claim to be liquidated through arbitration. Therefore, Lyons Hollis got "exactly what it bargained for." Id. "Having entered such a contract, [Lyons Hollis] must subsequently abide by the rules to which it agreed." Id. (quoting Hoffman v. Cargill, Inc., 236 F.3d 458 (8th Cir. 2001)).

Accordingly, for the reasons discussed in this opinion, Lyons Hollis has not satisfied its burden of proving the arbitrator identified the applicable, governing law and then ignored it. The arbitrator's award will stand and the Lyons Applications shall be denied. The Debtors' Motions requested the Court to either confirm the arbitrator's award or, if the Court considered modification of any part of the award, that it vacate the portion of the award in favor of Lyons Hollis. Since the Lyons Applications are denied, the Debtors' Motions shall be denied as moot.

V. CONCLUSION

For the reasons set forth in this Opinion, the Court shall issue separate orders denying the Lyons Applications and the Debtors' Motions.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: January 14, 2005

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge